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October 8, 2007

The Honorable Joseph J. Farnan, Jr.
United States District Court
For the Eastern District of Delaware
844 North King Street
Wilmington, DE 19801

VIA ELECTRONIC FILING

Re: *Affymetrix, Inc. v. Illumina Inc.*
C.A. No. 04-CV-901 JJF

Dear Judge Farnan:

In advance of the October 10, 2007, status conference, Affymetrix, Inc. ("Affymetrix") submits this letter setting forth several topics that it would like to address at the hearing.

Issues and timing for Phase II of the trial

By letter dated August 9, 2007, the parties previously requested a trial date commencing on any one of the following weeks: January 14, February 4, 11, and 18, 2008. (D.I. 439) Affymetrix remains available for trial during those weeks.

Affymetrix believes that, as discussed at the February 8, 2007 Pretrial Conference, Phase II of this case should include the issues of patent validity and willful infringement given the overlap of the two issues (Tr. at 16):

Counsel for Affymetrix: Okay. So we would move willfulness to the second phase, then?

Court: Yes. Exactly.

A one-week trial should be sufficient for these issues.

Affymetrix proposes that the Court hear the issue of alleged inequitable conduct promptly after the Phase II trial, at a time convenient for the Court. Proceeding in this manner will allow all of the patent issues to be completed so that they can be finally resolved. Illumina's antitrust

The Honorable Joseph J. Farnan, Jr.
October 8, 2007
Page 2

and business counterclaims can then be separately addressed, if necessary, after the Court lifts its stay and reopens discovery and that discovery is concluded.

Affymetrix's pending assignor estoppel motion

Currently pending is Affymetrix's Motion for Summary Adjudication on Illumina, Inc's Third and Seventh Affirmative Defenses and Second Counterclaim. (D.I. 272.) This motion seeks to preclude Illumina from challenging the validity of the '716 patent due to assignor estoppel. Affymetrix respectfully requests that the Court address this pending motion at the October 10 status conference.

The Court previously denied each of the parties' summary judgment motions *except* for Affymetrix's assignor estoppel motion. Resolution of Affymetrix's motion in Affymetrix's favor would streamline the Phase II trial by reducing the patents at issue to four and eliminating the need for testimony from two experts and one or more fact witnesses. Therefore, Affymetrix requests that this issue be addressed at the conference.

Illumina's failure to identify the prior art on which it intends to rely

On February 2, 2007, Illumina served its § 282 notice identifying alleged prior art on which it intended to rely. The notice listed 167 patent documents, 219 publications, and 23 individuals. The notice is not specific as to which patents nor which claims these 386 documents and 23 individuals pertain. Affymetrix has repeatedly requested that Illumina state which of these publications and individuals Illumina intends to rely on at trial, and to which patent claim each reference is relevant. Illumina has repeatedly refused to narrow its list of prior art.

To prepare for the validity issues of Phase II, Affymetrix must know upon which of the hundreds of alleged prior art references Illumina actually intends to rely. Therefore, Affymetrix respectfully requests that the Court order Illumina to narrow its prior art and identify to which claims the remaining references will be addressed at trial by October 18 or face preclusion of entering any such evidence.

Mechanics of Phase II trial

The parties will require some direction from the Court regarding the filing of Phase II motions in limine, exchange of demonstrative exhibits, and other procedural issues.

Respectfully,

/s/ Maryellen Noreika
Maryellen Noreika (#3208)

MN/dlb

cc: Clerk of Court (Via Hand Delivery)
Richard K. Herrmann, Esquire (Via Electronic Mail and Hand Delivery)
Marcus E. Sernel, Esquire (Via Electronic Mail)